IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.775 OF 1998

1. M/s.SBEC Sugar Limited
   a Company Incorporated under
   the Companies Act, 1956 and
   having its Registered Office
   at Village Loyan, Malkapur,
   Tehsil, Baraut, District :
   Meerut, 250 611 U.P. and H.O.
   at 1400 Hemkunt Tower, 98,
   Nehru Place, New Delhi
   110 019.

2. Mr.S.S. Agarwal being Vice
   President (Commercial) and
   Shareholder of Petitioner No.1
   Company 1400 Hemkunt Tower, 98,
   Nehru Place, New Delhi 110 019 .. Petitioners.

V/s.

1. Union of India through
   the Joint Secretary
   Ministry of Law Justice
   and Company affairs its
   office at Aaykar Bhavan,
   M.K. Road, Mumbai 400 020

2. The Chief Commissioner of
   Customs, having his office
   at New Custom House,
   Ballard Estate, Bombay - 38

3. The Commissioner of Customs
   (Imports) having office at
   New Custom House, Ballard
   Estate, Mumbai - 400 038

4. The Assistant Commissioner
   of Customs, Bond Department
   having his office at New
   Customs House, Ballard
   Estate, Mumbai - 400 038. .. Respondents.

Mr.M.R. Baya i/b. Mr.M.G. Gawde for the petitioners.

Mr.P.S. Jetly i/b. Dr.T.C. Kaushik for the

respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 3RD APRIL, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.) :

M/s.SBEC Sugar Limited (petitioner No.1 and hereinafter to be referred to as 'the company') and one of its shareholders S.S. Agarwal (petitioner No.2) have approached this Court under Article 226 of the Constitution of India for setting aside the demand for interest in respect of three consignments referred to in Exhibit 'A' annexed thereto and the letter dated 17th March, 1998 (Exhibit 'L') rejecting the prayer made by the company for waiver of interest.

2. The company was to set up a sugar plant at village Malkapur (Uttar Pradesh). For that purpose the company applied for industrial licence which was granted on 5th December, 1995. The company imported machines namely batch centrifugal, hydraulic drivers, continuous certrifugals and control and manual valves for the purposes of sugar plant.

3. As the controversy in the writ petition centres around the imported goods which were kept in the bonded warehouse vide bond No.CW-20-4732 dated

26th December, 1995, CW-20-4733 dated 26th December, 1995 and CW-20-4842 dated 2nd January, 1996, we restrict the facts to the said imported goods only. The two bonds CW-20-4732 and CW-20-4733 had an expiry date of 25th December, 1996 and the bond CW-20-4842 was to expire on 1st January, 1997. The company made an application on 19th December, 1996 for extension of bond which came to be rejected and the communication was sent to the company on 13th January, 1997. The request for extension of bond period came to be rejected in terms of the 2(i)(iii) of the public notice No.102/96 dated 5th June, 1996. The company upon receipt of the communication dated 13th January, 1997 made representation to the Chief Commissioner of Customs (respondent NO.2) against their request for extension of bond period and it is the case of the company that no communication in respect of the said representation has been received by the company.

4. The company has set up the case that in the Export-Import Policy, 1997-2002, the Central Government extended the Export Promotion Capital Goods Scheme (EPCG Scheme) to Agro-based industries and as per the notification No.29/97 dated 1st April, 1997 issued by the Central Government under Section 25(1), no duty of customs and additional duty (CVD)

was payable on the capital goods imported by the company covered by the licence under EPCG scheme. The company says that they applied for licence under EPCG scheme on 11th April, 1997 and ultimately the company was issued licence under EPCG scheme and after correction of initial mistake, endorsement 'zero duty' was made on the licence on 19th September, 1997. As per condition 5 of the licence, the company was required to execute a bank guarantee for 100% of the duty saved. The company made representation for reduction of bank guarantee by 50% of the duty paid but the said representation was rejected and it is the case of the company that on 14th January, 1998 they executed a bond and furnished a bank guarantee for 100% of the duty saved as required by the notification dated 1st April, 1997 and the condition of the licence. To a specific question asked by us to the advocate for the company, as to whether the bank guarantee furnished by the company for 100% of the duty saved as referred to in para 18 of the writ petition is alive or not, the advocate for the company was not able to make any firm statement.

5. Be that as it may, after the acquisition of licence under EPCG scheme, the endorsement thereon, the furnishing of the bond and the bank guarantee,

the company filed on 21st January, 1998, three bills of entry for ex-bond clearance of the imported goods for home consumption. Pertinently by that time, the three bonds namely CW-20-4732, CW-20-4733 dated 26th December, 1995 and CW-20-4842 dated 2nd January, 1996 had already expired on 25th December, 1996, 25th December, 1996 and 1st January, 1997 respectively. It is relevant and important to notice here that prior to the filing of the three bills of entries, the concerned authority called upon the company to pay the full amount of duty chargeable on account of the goods lying in bonded warehouse after expiry of the bond period together with interest, penalty, rent and other charges vide demand notice dated 26th September, 1997 under Section 72 of the Customs Act. Since the bond period had already expired much before the filing of the three bills of entry, the Assessing Officer on the reverse of one of the bills of entry calculated the duty payable by the company on the imported goods lying in the bonded warehouse (deemed to have been improperly removed under Section 72 on the date of expiry of the bond period) and interest payable thereon. The calculation of duty and interest payable by the company seems to have been made on 5th February, 1998.

6. The company and its shareholder filed the

present writ petition before this Court on 3rd April, 1998. The writ petition demonstrates clever drafting. In para 21, it is averred, 'at the time of assessment, respondent No.3 however, on the reverse of the original Bill of Entry endorsed payment of interest by the petitioner No.1 at the rate of 20% per annum from the date of expiry of bond upto the date of noting the ex-bond Bill of Entry. The petitioners crave leave to refer to and rely upon the endorsement made on the reverse of the original ex-bond Bill of Entry when produced as the same are in possession of the respondents'. Based on the aforesaid pleading and relying upon the judgment of the Supreme Court in the case of Pratibha Processors V/s. Union of India [1996 (88) E.L.T. 12 (S.C.)], the petitioners approached this Court and prayed that the demand of interest in respect of three consignments was bad-in-law since the duty itself was not payable in respect of the said goods.

7. By the order dated 29th April, 1998, rule was issued in the writ petition and the company was permitted to remove the goods on executing a bond, without payment of interest but on payment of other charges. The company executed a bond on 6th May, 1998 by undertaking that if any duty is finally assessed and payable, the difference of duty shall be

paid.

8. The goods vide the aforesaid three bills of entry were, thus, cleared by the company on execution of the said bond under the interim order of this Court.

9. The counsel for the petitioner heavily relied upon the judgment of the Supreme Court in the case of Pratibha Processors (supra) in support of his contention that no interest was payable under Section 61(2) of the Customs Act because no duty was payable on the said goods as those goods were imported against advance licence under EPCG scheme. He also relied upon the decision of the Supreme Court in the case of Commissioner of Customs, Chennai V/s. Jayathi Krishna & Co. [2000 (119) E.L.T. 4 (S.C.)] wherein Pratibha Processors was followed and it was held that interest on warehousing goods is merely an accessory to the principal and if the principal is not payable, so is the interest on it.

10. The counsel for the revenue, on the other hand, took us through the provisions of the Customs Act, particularly Sections 2(43), 2(44), 15(1)(b), 57, 58, 61, 68 and 72 and submitted that the said goods have to be treated to have been improperly

removed from the bonded warehouse on the date of the expiry of the bond period. The duty was, thus, payable when the bill of entry was filed and the company is not entitled to the benefit of notification dated 1st April, 1997. According to him, the removal of goods cannot be allowed on nil duty and since the duty was payable, it was computed accordingly on the reverse of the bill of entry on 5th February, 1998 but since the duty and interest were not paid, the goods were not allowed to be cleared initially and later on, pursuant to the order of this Court, the goods were permitted to be cleared on execution of the bond. The counsel for the revenue, thus, submitted that the company being liable to pay duty from the date of expiry of the bond period, demand of interest does not suffer from any error or law. He heavily relied upon the judgment of the Supreme Court in the case of Kesoram Rayon V/s. Collector of Customs, Calcutta [1996 (86) E.L.T. 464 (S.C.)].

11. Clauses (43) and (44) of Section 2 of the Customs Act define ‘warehouse’ and ‘warehoused goods’. ‘Warehouse’ means a public warehouse appointed under Section 57 or a private warehouse licensed under Section 58. ‘Warehoused goods’ means the goods deposited in a warehouse.

12. Section 12 is a charging section and provides for levy of customs duty on the dutiable goods.

13. Section 15 provides for date of determination of rate of duty and tariff valuation of imported goods. Under clause (b) of Section 15(1) in the case of goods cleared from a warehouse under section 68, the rate of duty and tariff valuation is as on the date on which the bill of entry for home consumption in respect of such goods is presented under that section.

14. Sections 57 and 58 deal with appointing of public warehouses and licensing of private warehouses respectively. Section 59 provides for execution of the bond by the importer of goods which have been entered for warehousing. Section 61 provides for the period for which goods may remain in warehouse.

15. Insofar as the goods in question are concerned, those are admittedly covered by Section 61(1)(b) and, accordingly, bond period is one year subject to extension , if any.

16. Section 68 provides for clearance of warehoused goods for home consumption. It reads

thus :

> "68. Clearance of warehoused goods for home consumption. - The importer of any warehoused goods may clear them for home consumption if -
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> (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;
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> (b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and
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> (c) an order for clearance of such goods for home consumption has been made by the proper officer.
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> [Provided that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of rent, interest, other charges and penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.]

17. Inter alia Section 72 provides that where any warehoused goods were removed from a warehouse on expiration of the period during which such goods were permitted under Section 61 to remain in a warehouse, the proper officer may demand the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

18. Fortunately for us the aforesaid provisions have been discussed by the Supreme Court in the case

of Kesoram Rayon. We, therefore, do not have to analyse the said provisions at great length. In summary what has been held by the Supreme Court is that the date of filing the bill of entry for home consumption determines the rate of interest in clauses (a) and (b) of Section 15. The period for which goods may be warehoused is prescribed in Section 61. By virtue of sub-section (2) of Section 61, interest is payable on the amount of duty on the warehoused goods for the period from the expiry of the permitted period till the date of their clearance from the warehouse, regardless of whether the goods have remained in the warehouse beyond the permitted periods by reason of extension of such periods or otherwise. The interest on the amount of duty on the warehoused goods is payable for the period subsequent to the permissible period upto their clearance. The goods are improperly removed from the warehouse under the terms of sub-section (1) of Section 72 if they are removed without clearance under Section 71 [clause (a)]; if they are taken as samples but without payment of duty [clause (c)]; if a warehousing bond has been executed in respect of the goods under Section 59 but they are not satisfactorily accounted for [clause (d)]; and if they have not been removed from the warehouse on the expiration of the permitted period or its permitted

extension [clause (b)]. In all such cases the Customs Officer is empowered to demand, and the importer shall pay, the full amount of duty chargeable on the goods and interest, penalties, rent and other charges thereon. The Supreme Court emphasized that the goods which are not removed from a warehouse within the permissible period are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty on them and, necessarily, it would be payable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted period or its permitted extension came to an end. It was held that the provisions of Section 68 and Section 15(1)(b) apply only when goods have been cleared from the warehouse within the permitted period or its permitted extension and not when, by reason of their remaining in the warehouse beyond the permitted period or its permitted extension, the goods have been deemed to have been improperly removed from the warehouse under Section 72.

19. In the backdrop of the aforesaid legal position exposited by the Supreme Court in Kesoram

Rayon, when we turn to the facts of the present case, it would be seen that the bond period expired in respect of two bonds on 25th December, 1996 and with regard to third bond on 1st January, 1997. Undisputedly, the application for extension of bond period made on 19th December, 1996 by the company was rejected on 13th January, 1997. That the demand under Section 72 was raised by the Proper Officer on 26th June, 1997 to pay amount of duty chargeable on account of the subject goods lying in the bonded warehouse after expiry of bonded period is not in dispute. As a matter of fact, the petitioners have not challenged the said demand made under Section 72 of the Customs Act vide notice dated 26th January, 1997. On expiry of bond period, as aforenoticed, the subject goods are treated to have been improperly removed under Section 72 from the warehouse. That improper removal took place even when the goods remained in the warehouse beyond the permitted period of permitted extension. Thus, at the time the bills of entry were filed by the company on 21st January, 1998, the Proper Officer was justified in computing the duty from the date of expiry of the bond period and the interest payable thereon. As a matter of fact the company was aware that the duty has been calculated by the concerned Officer along with interest on the reverse of the bill of entry but this

fact has been suppressed.

20. The edifice has been built on erroneous premise in the writ petition that no duty was payable on the goods and since no duty was payable on the goods no interest could be levied or demanded as interest is only the accessory to the principal and if the principal is not payable the interest is not payable. In challenging the demand of interest, the petitioners has misrepresented that the duty was not payable by virtue of notification dated 1st April, 1997 and the licence issued to the company under EPCG scheme and endorsement made thereon of zero duty.

21. Having noticed the facts above, we have no hesitation in holding that the provisions of Section 68 and consequently of Section 15(1)(b) have no application since the goods were not cleared from the warehouse within the bond period. Admittedly, no extension was granted. By reason of goods having remained in the warehouse beyond 25th December, 1996 insofar as two consignments were concerned and beyond 1st January, 1997 with regard to the third consignment, the goods shall be deemed to have been improperly removed from the warehouse under Section 72 and the Proper Officer was justified in calling upon the company to pay the customs duty on them as

may be payable at the rate applicable at the rate on the date on which the bond period expired. As a matter of fact, there is no challenge to the demand made under Section 72 on 26th September, 1997 calling upon the company to pay full amount of duty chargeable on account of the subject goods together with penalties, rent, interest and other charges. We are surprised that the respondents permitted the company to remove the goods on execution of bond alone though by the order dated 29th April, 1998 what the Court permitted the petitioners was to remove the goods on their executing bond without payment of interest but on payment of other charges. In other words, as per the interim order dated 29th April, 1998 passed by this Court, save and except, demand of interest, the company was liable to pay all other charges including the full amount of duty together with other charges as demanded vide notice dated 26th September, 1997.

22. The present case is wholly and squarely covered by the judgment of the Supreme Court in the case of Kesoram Rayon. There is not and cannot be any doubt about the legal position that interest on warehousing goods is merely an accessory to the principal and if the principal is not payable, interest is not payable because interest under

Section 61(2) of the Customs Act has no independent and separate existence. This legal position has been reiterated by the Supreme Court in the case of Pratibha Processors and Jayathi Krishna & Co. But these two cases have no application to the facts of the present case, as we have already noticed that the company is liable to pay the duty as per the demand already raised under Section 72 vide notice dated 26th September, 1997. There is no challenge to the said notice.

23. The contention of the counsel for the petitioners that the goods were ordered to be cleared on nil duty under Section 68 is wholly misconceived and based on factual inaccuracy. As already indicated by us that at the time the bills of entry were filed by the company, the competent authority assessed the goods liable to duty on the reverse of the bill of entry. We may treat that assessment as provisional. The goods were ordered to be cleared under the interim order of this Court. As per the bond executed by the company, it is liable to pay the difference of duty as may be finally assessed. Since the company is liable to pay the duty on the goods, the entire argument of the counsel for the petitioners that no interest is payable as no duty is payable is founded on misconceived notion.

24. In what we have discussed above, the respondent No.4 shall now finally assess the duty and other charges payable by the company in respect of the subject goods under the three bills of entry and the consignments referred to at Sr.No.1 to 3 in Exhibit 'A' and also interest payable by the petitioners and recover the same from the company. If the payment of duty, interest and other charges is not made by the company within two weeks from the date of determination and the communication thereof, the customs authorities shall enforce the bond executed by the company on 6th May, 1998 pursuant to the order of this Court dated 29th April, 1998.

25. The result is that we would dismiss the writ petition with costs that we fix at Rs.10,000/-. We order accordingly.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)